

## MEMORANDUM

**TO:** Lee Sim, Assistant State Engineer - Distribution  
Kent L. Jones, Assistant State Engineer - Appropriation  
Ward Wagstaff, Assistant Attorney General - DNR  
**FROM:** Kerry Carpenter, Southwestern Region Engineer  
**DATE:** 09 May 2002  
**RE:** Distribution of rights under Beaver River Decree, Awards 123(a) & (b)

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### BACKGROUND

The following two tables summarize the several water rights as they were described in two Proposed Determinations of Water Rights which have been prepared by the Division of Water Rights pursuant to adjudication orders from the Fifth District Court.

123 (a)	Owner	Flow	Limitation(s) / Remarks	PD Page
77-598	Baldwin	0.33 cfs	598 & 599 limited to 21.60 acres	7
77-761	Brown	0.33 cfs	761 & 762 limited to 21.67 acres	8
77-763	Beaumont	½ of 0.33 cfs	763/766 limited to 21.60 acres	8
77-765	Beaumont	½ of 0.33 cfs	763/766 limited to 21.60 acres	8
Totals		1.0 cfs	All rights total 64.8667 acres	

123(b)	Owner	Flow	Limitation(s)	PD Page
77-599	Baldwin	0.33 cfs	598 & 599 limited to 21.60 acres	54
77-762	Brown	0.33 cfs	761 & 762 limited to 21.67 acres	8
77-764	Beaumont	½ of 0.33 cfs	763/766 limited to 21.60 acres	9
77-766	Beaumont	½ of 0.33 cfs	763/766 limited to 21.60 acres	9
Totals		1.0 cfs	All rights total 64.8667 acres	

**Table 1. Rights Under Awards 123(a) and 123(b) from Proposed Determination of Water Rights dated 01 April 1969**

**Note:** It is not clear whether the limitation of 21.60 acres for Water Rights 77-598, 599, 763/766 was intentional or represents a clerical error. It appears that this limitation should have been equal to ⅓ of 65 acres or 21.6667 acres, as is described for 77-761, 762.

123 (a)	Owner	Flow	Limitation(s) / Remarks	PD Page
77-598	Brown	0.333 cfs	598 & 599 limited to 21.67 acres	9
77-761	Brown	0.333 cfs	20.14 acres irrigated; no limit defined	9
77-763	Beaumont	½ of 0.333 cfs	763/766 limited to 21.67 acres	10
77-765	Beaumont	½ of 0.333 cfs	763/766 limited to 21.67 acres	10
Totals		1.0 cfs	Not defined due to 77-761	
123(b)	Owner	Flow	Limitation(s)	PD Page
77-599	Baldwin	0.33 cfs	598 & 599 limited to 21.67 acres	40
77-762	Brown	0.33 cfs	20.14 acres irrigated; no limit defined	38
77-764	Beaumont	½ of 0.33 cfs	763/766 limited to 21.67 acres	39
77-766	Beaumont	½ of 0.33 cfs	763/766 limited to 21.67 acres	16
Totals		1.0 cfs	Not defined due to 77-761	

**Table 2. Rights Under Awards 123(a) and 123(b) from “Indian Creek” Proposed Determination of Water Rights dated 27 December 1991**

**Note:** Due to a clerical error, the point of diversion for 77-766 was described as being in T27S rather than in T28S; an Errata item has been submitted to the Adjudication Section.

It should be noted that the Beaver River Decree<sup>1</sup> (“BRD”) designated a total of 65 acres to be irrigated under Award 123. Award 123(a) was assigned a priority date of 1875 and a point of diversion on Indian Creek for 1.0 cfs; Award 123(b) was designated as “supplemental irrigation”, assigned a priority of 1890, and points of diversion in unnamed springs for 1.0 cfs. There was one subsequent decree (“the Hoyt Decree”)<sup>2</sup>, but the court file has been lost, so the effects of that litigation are debatable. It is my opinion that the Hoyt Decree did not intend to materially alter the subject water rights but to confirm them as described in the BRD. If additional information is desired in that regard, I can provide it.

<sup>1</sup>*W.L. Hardy, et al. vs. Beaver County Irrigation Co., et al.* (Civil No. 625), Judge LeRoy H. Cox, 13 November 1931.

<sup>2</sup>*Leonard Beaumont, et al. vs. Lafe Bradshaw, et al.* (Civil No. 2796), Judge Will L. Hoyt, 11 June 1957

**EFFECTS OF CHANGE APPLICATION 77-598 (a16250)**

Filed: 05 July 1991    Evidenced by: 77-598 & 77-761 ( $\frac{2}{3}$  of Award 123(a))  
Applicant: Brown    Approved: Memorandum Decision dated 29 April 1992

Pertinent Points:

1. Although based on rights representing  $\frac{2}{3}$  of Award 123(a) – the “primary right” – irrigation was limited to  $\frac{1}{3}$  of the total of 65 acres (21.67 acres) decreed in the BRD and described in the 1969 proposed determination.
2. If the “Primary/Auxiliary”<sup>3</sup> interpretation of the BRD had been strictly observed, Brown would have been permitted to change 43.34 acres (  $\frac{2}{3}$  of 65.0 acres), and both Brown and Baldwin would have been prohibited from any irrigation under water rights 77-599 and 77-762, the “auxiliary” counterparts to the “primary” rights approved for change.
3. Beaumont would have been limited to diversions of 0.33 cfs for a total of 21.67 acres under his “primary” rights, 77-763, 765, and/or his “auxiliary” rights, 77-764, 766.
4. All flows available at the “unnamed springs” in excess of 0.33 cfs would have to be left undiverted for the benefit of downstream users (principally, Award 124(a), 77-9).
5. Condition of approval 3 in the Memorandum Decision specifically prohibits irrigation of “. . .the land that has been irrigated heretofore under the subject flow [77-598, 761, Award 123(a)] and the supplemental spring flow [77-599, 762, Award 123(b)]. . .”  
[Underlining added]

How do we properly interpret Condition of approval 3 in the Memorandum Decision? Does this restriction also prohibit Baldwin from exercising his “auxiliary” right, 77-599, because the “primary” counterpart, 77-598, has been changed to other acreage?

Before you answer these questions, read on. . .

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<sup>3</sup>See “Policy Memorandum” dated 09 July 2001, Footnote 1

**EFFECTS OF BEAUMONT v. BROWN, MORGAN, BALDWIN<sup>4</sup>**

The State Engineer's decision on Brown's Change Application 77-598 (a16250) was appealed by Beaumont. From the "Findings of Fact," "Conclusions of Law" and "Judgement, the following points can be gleaned.

From the "Findings of Fact":

- ¶3 Acknowledges ownership of 123(a) as being vested  $\frac{1}{3}$  in Beaumont (77-763 and 77-765) and  $\frac{2}{3}$  in Brown (77-598 and 77-761).
- ¶4 Notes that the Baldwin ownership in 123(b) (77-599) is in question, but right is declared to be "...supplemental to main right." Ownership is left unresolved.
- ¶5 Refers to rights derived from 123(a) as "primary" (77-598, 761, 763, 765).
- ¶7 Refers to rights derived from 123(b) as "supplemental" (77-599, 762, 764, 766). Also refers to 123(b) as the "Beaumont (Beaumont/Brown) water right."<sup>5</sup>
- ¶19 The court defers the resolution of Beaumont's exclusive right to all spring flows under 123(b) to the General Re-adjudication because this issue was not properly tried in these proceedings.
- ¶20 The court declines to enter an order prohibiting Brown from using spring waters (123(b), 77-762) on lands in Sections 28 and 29 ("heretofore" places of use under a16250) because condition 3 in the State Engineer's Memorandum Decision already does that. The court does not directly address the right of Baldwin under 123(b), 77-599.

From the "Conclusions of Law":

- ¶2 The State Engineer's approval of a16250 is affirmed.

From the "Judgement":

- ¶2 The Memorandum Decision on 77-598, 761 (a16250) is approved and affirmed.

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<sup>4</sup>*Beaumont v. Morgan, Brown and Baldwin, v. Manderfield Irrigation Co., Plaintiff in Intervention*, Beaver County Civil No. 92-040, Judge Phillip J. Eves.

<sup>5</sup>Mr. Keith Beaumont interprets this language as resolving the issue of the Baldwin ownership: Baldwin is not mentioned because the court has concluded that Baldwin has no right.

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## CONCLUSION AND QUESTIONS

All the documentation herein summarized and considered appears to affirm the applicability of the "Primary/Auxiliary" interpretation of Awards 123(a) and 123(b) from the BRD except the limitation under Brown's Change Application 77-598 (a16250) to  $\frac{1}{3}$  of the 65.0 acres decreed. In order to leave Award 123 whole, i.e., sufficient for 65 acres, it is necessary to either:

1. Increase Brown's right under 123(a), 77-598 and 77-761, to 43.34 acres and prohibit all irrigation at the historic place of use under 77-599 and 77-762; or
2. Allow Baldwin to exercise the right under 123(b), 77-599 for 0.33 cfs/21.67 acres.

For immediate distribution purposes, I have advised our Commissioner (Ron Roberts) to tell Baldwin (Brent) that it does not appear that they have any right to take water under 77-599. However, I have also advised the Commissioner that this position is under review and is subject to change.

How do we properly interpret condition of approval 3 in the Memorandum Decision on 77-598 (a16250)? Does this restriction also prohibit Baldwin from exercising his "auxiliary" right, 77-599, because the "primary" counterpart, 77-598, has been changed to other acreage?

If the answer to the foregoing question is "Yes," how do we make Award 123 whole? We have a Memorandum Decision and a court Judgment affirming the decision which limits Brown to 21.67 acres.

Are we required to make Award 123 whole? Brown has accepted the Memorandum Decision and the court's judgement limiting their irrigation to 21.67 acres. Does this constitute Brown's consent to reduce their  $\frac{2}{3}$ -interest in 123(a) from 43.34 acres to 21.67 acres?<sup>6</sup>

Here's one for Kent: Proof has been filed on 77-598(a16250) showing irrigation of 54.941 acres, sole supply for 21.67 acres. The additional acreage is covered under shares in the local irrigation companies. If Brown's amends their proof to state a sole supply for 43.34 acres under 77-598 and 77-761, can we accept this as their legitimate acreage and correct this situation by virtue of an "Amendatory Change", or does that set us cross-wise with the court judgement?

Please contact me if you have questions or wish to discuss this matter in greater detail.

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<sup>6</sup>Brown's signed application states that they will limit their  $\frac{2}{3}$ -interest in 123(a) to 21.67 acres under the change, but that they will retain the right to irrigate 10.83 acres at the original place of use under their  $\frac{1}{3}$ -interest in 123(b). This would seem to imply that Baldwin's could also exercise their  $\frac{1}{3}$ -interest in 123(b). Both the State Engineer's Memorandum Decision and the court's Judgement applied the 123(a) limit of 21.67 acres, but denied any use of 123(b), specifically to Brown and possibly to Baldwin.